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IN THE

Supreme Court of the United States

October Term, 1968

No. 886

UNITED JEWISH APPEAL OF GREATER NEW YORK, INC.; UNITED JEWISH APPEAL, INC.; FEDERATION OF JEWISH PHILANTHROPIES OF NEW YORK and ASSOCIATION POUR LE RETABLISSEMENT DES INSTITUTIONS ET OEUVRES ISRAELITES EN FRANCE ET DANS SES POSSESSIONS D'OUTREMER (A.R.I.F.) INC.,

Petitioners,

v.

LEON SCHAEFLER, as Executor of the Last Will and Testament of ALBERT L. KING, Deceased; LEON SCHAEFLER and FIRST NATIONAL CITY BANK, as Trustees under the Last Will and Testament of GRACE KING, Deceased, and THE SALVATION ARMY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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LEON SCHAEFLER

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United Jewish Appeal of Greater New York, Inc.; United Jewish Appeal, Inc.; Federation of Jewish Philanthropies of New York and Association pour le Retablissement des Institutions et Oeuvres Israelites en France et dans ses Possessions d'Outremer (A.R.I.F.) Inc.,

Petitioners,

v.

Leon Schaefler, as Executor of the Last Will and Testament of Albert L. King, Deceased; Leon Schaefler and First National City Bank, as Trustees under the Last Will and Testament of Grace King, Deceased, and The Salvation Army,

Respondents.

BRIEF IN OPPOSITION

Petition Not Timely

The order of the New York Court of Appeals which the petitioners seek to have this Court review was entered by the Court of Appeals on July 2, 1968. Yet the petition for a writ of certiorari was not filed with this Court until December 30, 1968, which was more than ninety days after entry of the Court of Appeals order. Consequently, the petitioners have failed to meet the time requirement imposed by 28 U.S.C. §2101(c). This states that:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the

> entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Similarly, the petitioners are in default under Rule 22(3) of the Rules of this Court, which provides that a petition for certiorari is timely when it and the record are filed with the Clerk within the time prescribed by law. That time is, of course, the ninety days established by 28 U.S.C. §2101(c).

The order by the Court of Appeals is contained in that court's opinion, which was issued on July 2nd and part of which was printed as Appendix C to the petition for a writ of certiorari. As the official report of the case shows, the ruling by the Court of Appeals concluded with the following determination, which was not included in Appendix C:

> "Order reversed, with costs payable out of the trust estate to all parties appearing separately and filing separate briefs and matter remitted to the Surrogate's Court for further proceedings in accordance with the opinion herein." (22 N.Y. 2d at 465.)

The petitioners appear to be measuring their time limit from the entry by the Surrogate's Court on October 1, 1968 of its order on remittitur (Petn. App. D). Pages 1 and 2 of the petition treat the Surrogate's Court order as though it were the one to be reviewed by this Court, and of course the ninety-day requirement would be met if that were the case. However, the order by the Surrogate's Court merely makes the order of the Court of Appeals the order of the lower court and directs the payment of counsel fees, costs and disbursements to the parties who appeared in the Court of Appeals; the rights of the parties were fully determined by the Court of Appeals order. Furthermore, only the Court of Appeals order would satisfy the jurisdictional

criteria for this appeal, which (as appears on page 2 of the petition) is 28 U.S.C. §1257(3). That provision permits this Court to review judgments or decrees from only the highest court of a state. To comply with that requirement, the petitioners, inconsistently, have requested that the writ of certiorari be directed to the Court of Appeals.

However, it is not permissible to slide through this Court's jurisdictional standards in that fashion. The Court has previously ruled that, in a case coming from the New York Court of Appeals, the time to apply for certiorari begins to run on the date on which that court enters its order, not the date on which the lower court's order on remittitur is subsequently entered. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942). In a per curiam denial of a petition for certiorari in *Pink*, this Court stated:

> "Certain questions with respect to the timeliness of applications for review of state court judgments, which are now pending before us in petitions for rehearing in two cases, have recurred so frequently that we think it appropriate to add a word for the guidance of the Bar. It is true that our writ to review a judgment of the highest court of a state may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals. It is nevertheless immaterial whether the record is physically lodged in the one court or the other, since we have ample power to obtain it from either. *Atherton* v. *Fowler*, 91 U.S. 143, 146. In reliance upon the early decision in *Green* v. *Van Buskerk*, 3 Wall. 448, the period for appeal or application for certiorari has on occasion been computed not from the judgment or order of the New York Court of Appeals, but from the judgment subsequently entered

> by the lower court upon the Court of Appeals' remittitur. This practice, which is a departure from the rule applied to cases from other states, is inconsistent with our many decisions on the nature of a final judgment under §237 of the Judicial Code, 28 U.S.C. §344, and cannot be sanctioned. * * * This rule applies with equal force to cases from New York, in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of §237 of the Judicial Code, a final judgment reviewable here." (317 U.S. at 267-68.)

The sections of the Judicial Code on which the Court relied in the *Pink* case are essentially the same as present law. Section 237 of the Judicial Code (28 U.S.C. §344 (1940 ed.)) is the predecessor of present 28 U.S.C. §1257(3)—the provision invoked by the petitioners as their basis for jurisdiction. Similarly, the present ninety-day limitation contained in 28 U.S.C. §2101(c) is derived from the three-month limitation imposed by 28 U.S.C. §350 (1940 ed.), in effect at the time of the *Pink* case.

The ruling in *Pink* has been cited by the Court on numerous occasions since it was first announced, and the case still represents the law on this question. *E.g., United States* v. *Adams*, 383 U.S. 39, 41 (1966); *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 546, 547 (1947); *Cole* v. *Violette*, 319 U.S. 581 (1943).

Petition Lacks Merit

Even if the petition had been filed on time, it should be denied because this case fails to meet the criteria for certiorari established by Rule 19(1) of the Rules of this Court. Although

the petitioners state on pages 3-4 of their petition that the case presents three questions, in fact they all come down to one, and that is merely whether Congress intended Int. Rev. Code §2207 to authorize a testator to impose more than a ratable share of tax on appointive property.

While the petitioners contend that the answer reached by the Court of Appeals precipitates two constitutional issues, this argument is erroneous. The flaw appears on page 8 of the petition, where the petitioners admit that the acknowledged duty imposed by §2207 to contribute a proportionate amount of tax is constitutional but contend that the power which the Court of Appeals found Congress had given to testators to increase the burden of ratable apportionment is unconstitutional. In other words, the petitioners state that Congress may validly enter the apportionment field to the extent of imposing some share of tax (a proportionate amount) on taxable appointive property, but Congress violates due process and the rights of the states if it imposes a greater share (or permits a testator to do so, as the Court of Appeals held in this case). This proposition is patently incorrect or, at least, insubstantial. Although the contention was briefed by the petitioners in the courts below, it was not even mentioned in any of the opinions. When analyzed, there is no constitutional issue in this case—merely the question of which of alternate constructions of §2207 was intended by Congress—both being permissible.

However, the proper construction of this tax apportionment statute is hardly significant enough to merit the attention of the Supreme Court. This would be so even if the construction had constitutional overtones. There are several reasons for these conclusions:

1. The revenue itself is entirely unaffected by §2207, however it is construed. The estate tax is fixed by §§2001 to 2108 of the Internal Revenue Code. Section 2207 comes into

play only after the tax has been determined and is then used to apportion the ultimate incidence of the tax among appointive property and the other assets of the taxable estate.

2. Whether §2207 should be construed to confer a federally-created limited power of appointment or not is of little moment, since the section applies only where the testator already has a general power of appointment that is includable in his taxable estate. Thus, regardless of how this case is decided, any testator who wants to do as this decedent intended, need only express his direction regarding ultimate tax liability by exercising his power of appointment in accordance with applicable local property law. The testator in the case at bar failed to do that (in reliance on §2207), but if this case were reversed, every informed testator in the future would, by definition, have the remedy at hand.

3. Further evidence of the unimportance of §2207 is the fact that this case appears to be the first and only time that the section has ever been construed by any court in the nation in the twenty-six years since it was enacted.

4. Obviously there is no conflict in the decisions construing §2207, and it does not appear that there ever will be. Rather than waste this Court's time in reviewing the decision below, it would be wise to await the materialization of a conflict.

5. Even if there were doubt over whether the construction of §2207 reached by the court below is an unconstitutional infringement on the rights of the states, this case would be an inappropriate vehicle for exploring the question. For the decedent here was not a resident of any of the states in the Union. He resided in Paris, France at the time of his death, and his estate was subject to the federal estate tax because he was a United States citizen.

Conclusion

The Court should deny the petition for a writ of certiorari.

Dated: New York, N.Y., January 21, 1969.

Respectfully submitted,

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